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U.S. Citizenship and Immigration Services

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[redacted]

FILE: LIN 06 013 52514 Office: NEBRASKA SERVICE CENTER Date: JUN 13 2007

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Laura Deadrick
for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability and a member of the professions holding an advanced degree. The petitioner seeks employment as a postdoctoral scholar. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel asserts that the director erred by denying the matter for reasons not raised in the request for additional evidence. Counsel relies on two non-precedent decisions by this office, not provided, for the proposition that, having issued a request for additional evidence, the director may not now deny the petition on a different basis without first issuing a new request. As counsel did not provide those cases, it is not known whether they involved a similar benefit. Regardless, while the regulation at 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel has not stated that evidence would have been available to submit in response to a second request for additional evidence that was not submitted on appeal. Thus, we find that the most expedient remedy for any failure to issue a second request for additional evidence is to consider the evidence submitted on appeal in this decision.

Ultimately, the record does not support counsel's characterizations of the petitioner's credentials and is not supported by letters from independent experts or evidence that the petitioner has been widely cited. In fact, as of the date of filing, the most significant work done by the petitioner according to his references had yet to be published and, thus, widely disseminated in the field. For these reasons, which will be detailed below, we uphold the director's decision.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer.

> (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

It appears from the record that the petitioner seeks classification as an alien of exceptional ability. This issue is moot, however, because the record establishes that the petitioner holds a Ph.D. in Microbiology and Molecular Genetics from the University of Vermont. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree.

While the issue of exceptional ability is moot, counsel's mischaracterizations of the significance of the evidence submitted to demonstrate exceptional ability bear mention. Significantly, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). We note that the evidence submitted to meet the regulatory criteria for exceptional ability, set forth at 8 C.F.R. § 204.5(k)(3)(ii) must be indicative of or consistent with the regulatory standard for that classification: a degree of expertise significantly above that ordinarily encountered. While counsel asserts that the petitioner has 12 years of experience, the petitioner only claims on his curriculum vitae to have worked *part-time* prior to 2004. The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B) requires ten years of "full-time" experience. Regardless, the petitioner did not submit the required evidence to meet that criterion: letters *from employers* documenting at least *ten years* of employment.[1] Finally, the petitioner submitted no evidence that his professional membership, citation record of two citations and a scholar *in training* travel award are indicative of a degree of expertise above that ordinarily encountered in the field.

The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest. Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

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[1] We do not read the regulations at 8 C.F.R. § 204.5(k)(3)(ii)(B) and 8 C.F.R. § 204.5(g)(1) as allowing an employer to verify experience with a prior employer. *See generally* 8 C.F.R. § 103.2(b)(2) for the proposition that affidavits should come from individuals with "direct personal knowledge" of the facts they are verifying.

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the petitioner works in an area of intrinsic merit, bioinformatics, and that the proposed benefits of his work, improved individualization of cancer treatments based on the patient's genetics, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Counsel and some of the petitioner's references discuss the importance of attracting researchers to the United States. The petitioner submits articles discussing the importance of scientists to the national interest. Counsel cites no authority for a presumption that the national interest waiver was intended as a blanket waiver for scientists. Significantly, Congress created a visa classification for outstanding researchers and we know of no reason to presume that the national interest waiver was intended as a blanket waiver for all researchers unable to meet the high standards of that classification.[2] It is the position of Citizenship and Immigration Services (CIS) to grant national interest waivers on a case-by-case basis, rather than to establish blanket waivers for entire fields of specialization. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 217.

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[2] *See* Section 203(b)(1)(B) of the Act, 8 U.S.C. § 1153(b)(1)(B).

Several references discuss the importance of the multi-institution collaboration for which the petitioner works. We have acknowledged the substantial intrinsic merit and national scope of the proposed benefits of the petitioner's work above. Ultimately, however, eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 218.

Several references also discuss the petitioner's unusual combination of skills. [redacted] the petitioner's current supervisor, asserts that the petitioner "has had extensive training in both molecular biology and bioinformatics. Scientists with the combination of both skills are very rare." [redacted] a collaborator, asserts that the petitioner's "unique skills" in computational pharmacogenomics "ensure that he will develop innovative solutions to problems in the area of cancer research." [redacted], a collaborator, asserts that the petitioner "is one of only a few scientists in the world who has the background and training to address the biomedical problems as both a computational biologist and molecular biologist." [redacted] a member of the petitioner's Ph.D. thesis committee, asserts:

> [The petitioner's] background is unique because he has hands-on molecular biology experience with cloning, expression and sequence analysis of genes in combination with bioinformatics and computational biology. There are few scientists in this country with this particular expertise and thus [the petitioner] is very much in demand for industrial and academic positions.

[redacted], the petitioner's Ph.D. supervisor, asserts that the U.S. needs scientists with the petitioner's training and that it is difficult to recruit scientists with the petitioner's skills.

It cannot, however, suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

[redacted] subsequently asserts that the national interest would not be served by pursuing the "time-consuming" alien employment certification process. The record contains no evidence that the Department of Labor's current process for certifying alien employment certifications (in effect since March 28, 2005) is "time-consuming." Regardless, nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. *Id.* at 223.

On appeal, [redacted] reiterates that the petitioner's specific combination of computational biology and molecular biology expertise is essential and unique. [redacted] then asserts that a "minimally qualified

researcher with some biology and/or computer science expertise could acquire the equivalent expertise like [the petitioner's]." [redacted] then states that this expertise "could not be readily articulated for purposes of the labor certification." [redacted] appears to equate minimally qualified with unqualified. If the job requires, at a minimum, a combination of experience in two specific areas, it is not clear why the petitioner's employer is unable to specify such experience on the application for alien employment certification, ETA Form 9089. Moreover, [redacted] provides no explanation for why no other individual is capable of *acquiring* the experience the petitioner has acquired. Even if true, the alien employment certification process would still serve to identify the petitioner as uniquely qualified.

[redacted] asserts that she "intended" to say that "the specific combination of expertise like [the petitioner's] was unique among his fellow researchers in the general field of computational genomics and bioinformatics." We are not persuaded that [redacted] is saying anything new on appeal. If the petitioner has unique training and experience, that training and experience can be expressed on an application for alien employment certification.

Finally, [redacted] asserts that there is no shortage of researchers "with minimum or even higher qualifications in the general field of his research" but that the success of a federally funded national medical research initiative, such as the one on which the petitioner works, "absolutely depends on having a large number of highly qualified scientists working on the initiative."

[redacted]s assertion brings us to the real issue in this matter, whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

Initially, counsel submitted a chart purporting to set the petitioner apart from his peers. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. at 534; *Matter of Laureano,* 19 I&N Dec. at 1; *Matter of Ramirez-Sanchez,* 17 I&N Dec. at 506. Counsel provides no support for his assertions as to what is average for a researcher. Moreover, the record does not support counsel's factual assertions. For example, counsel concludes that the petitioner's presentation rate exceeds that of the average researcher because he has presented his work more than ten times. On the petitioner's curriculum vitae, the petitioner lists only three major conference presentations in the United States. The remaining presentations include those in preparation as of the date of filing, two retreats that appear to have had a more limited audience than a major conference, and two presentations in China that appear unrelated to the petitioner's current work.

Counsel concludes that the petitioner exceeds the average researcher because he has been one of the "major contributors" for six papers. Counsel concedes, however, that only three of those papers had actually been published. In fact, despite a claim by [redacted] that the petitioner had published an article in the *Journal of Molecular Evolution*, the record does not establish that, as of the date of filing, the petitioner had published a single article based on his Ph.D. or postdoctoral research, the focus of this petition.

In addition, while counsel may be correct that the "average" researcher does not have an "invention claim," it would seem likely that the number of patents varies widely by field, with pharmacology research more likely to lead to patents than more basic biology research. Regardless, as stated above, an alien cannot secure a national interest waiver simply by demonstrating that he or she holds a patent. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 221, n. 7.

Finally, counsel asserts that the petitioner's contributions set him apart from his peers. In order to evaluate this claim, we must review the reference letters of record. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In evaluating the reference letters, we note that letters containing mere assertions of industry interest and positive response in the field are less persuasive than letters that provide specific examples of how the petitioner has influenced the field. In addition, letters from independent references who were previously aware of the petitioner through his reputation and who have applied his work are the most persuasive.

As stated above, the petitioner obtained his Ph.D. in 2004 from the University of Vermont under the direction of [redacted]. The petitioner then joined the PAAR group at the University of Chicago (UIC), chaired by [redacted] at UIC and vice-chaired by [redacted] at St. Jude Children's Hospital in Memphis. As explained by [redacted] PAAR, which also includes researchers from the University of Pittsburgh, is one of twelve initiatives in pharmacogenomic research funded by the National Institutes of Health (NIH). The aim of PAAR is to examine how the benefits and toxic side effects of certain chemotherapy drugs vary among people. We do not question the prestige of this research group. We will not, however, infer the petitioner's influence in the field simply by his association with this group. Rather, the petitioner must establish his individual influence in the field.

[redacted] discusses the petitioner's grades, standardized test scores and grant funding from the Department of Energy at the University of Vermont. Academic performance, measured by such criteria as grade point average, cannot alone satisfy the national interest threshold or assure substantial prospective national benefit. In all cases the petitioner must demonstrate specific prior achievements that establish the alien's ability to benefit the national interest. *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 219, n.6. The petitioner's research fellowship was approved by the Department of Energy's Experimental Program to Stimulate Competitive research located at the University of Vermont. Thus, while the funds may ultimately derive from the Department of Energy, the individual funding decisions appear to be made locally and the fellowship appears limited to students at that institution. Regardless, most research, in order to receive funding, must present some benefit to the general pool of scientific knowledge. It does not follow that every researcher working with a government grant inherently serves the national interest to an extent that justifies a waiver of the job offer requirement.

[redacted] then discusses the petitioner's research at the University of Vermont. Specifically, the petitioner investigated mutation and selection effects relevant to p53, a human cancer gene. The petitioner "estimated the sequence-dependent DNA mutation rates using primate genomic sequences provided by the NIH Intramural sequencing Center." The petitioner, for the first time, "presented the mutation rates of the 96 classes of triplet-triplet changes in DNA estimated using a set of primate genomic sequences, while other researchers usually assume that the mutation sites are independent, which we know it [sic] is incorrect." [redacted] asserts that this work provided a "novel way to study the evaluation" of p53 and, in fact to study the evolution of other disease-related genes. [redacted] asserts that this work was presented at a conference and "led to [the petitioner's] first-authored paper for the Journal of Molecular Evolution." [redacted] who served on the petitioner's thesis committee, provides similar information. [redacted] further states that the petitioner "confirmed what we learned from experiments in my lab."

While the record contains a May 2004 e-mail advising [redacted] that the petitioner's article had been found acceptable "pending revisions," the record lacks evidence that the petitioner completed those revisions and that the journal ultimately published this work. The record does, however, confirm that the petitioner presented this work at a conference in 2004. The petitioner did not, however, submit evidence from independent researchers pursuing new avenues of research with p53 or other disease-related genes based on his work. The record also lacks evidence that the petitioner's conference presentation has been cited.

The petitioner submitted a lengthy letter fro[redacted] identifying and discussing ten contributions. These ten contributions include the petitioner's work at the University of Vermont, three projects that predate the petitioner's Ph.D. research, and several projects where the results had yet to be disseminated in the field either through conference presentation or publication.

[redacted] explains that Epidermal Growth Factor Receptor (EGFR) is a novel target for chemotherapy due to its function in the control of cell growth and relation to the development of cancer. Thus, the

FDA has approved several EGFR inhibitors although little is known about the relationship between human gene expression and the toxicity of these drugs. The petitioner "contributed significantly to the project of identifying candidate genes that affect the pharmacodynamics of EGFR-targeted anti-cancer agents," establishing for the first time the relationship between the expression of a specific phosphate transporter, SLC17A1, and the cellular toxicity of EGFR inhibitors. This work was presented via PAAR videoconference to other PAAR members and was being prepared as a manuscript but had yet to be reported outside of PAAR. [redacted] asserts that this work has led to additional research avenues within PAAR and has the potential to benefit the pharmaceutical industry. As of the date of filing, UIC was evaluating the technology disclosure regarding this work and ultimately decided to pursue a patent. The record lacks evidence that pharmaceutical companies or other laboratories had expressed any interest in licensing or otherwise applying this patent-pending innovation.

The petitioner also investigated an enzyme subfamily, UGT1A, that make metabolic products more easily excreted from the body and, thus, are related to the effectiveness of anticancer drugs. The petitioner analyzed the nucleotide sequences of members of this subfamily using bioinformatics methods, identifying a pool of nucleotides that are correlated with an observed tissue-specific expression pattern of the UGT1A members. [redacted] asserts that this work reduced costly and time-consuming research by identifying a pool of nucleotides on which to focus. The petitioner received his Scholar-in-Training travel grant to attend a conference to present this work. While the grant may indicate the promising nature of this work, it does not establish the ultimate influence of this work. The record lacks letters from independent experts applying this work or evidence that the presentation has been widely cited.

The petitioner's remaining research performed at UIC discussed by [redacted] had yet to be presented or published as of the date of filing. Thus, it had not been widely disseminated in the field. While [redacted] speculates as to the future benefit of this work, those benefits had yet to be realized. The remaining letters are from other PAAR members and provide similar information.

The record shows that the petitioner is respected by his colleagues and has made useful contributions in his field of endeavor with potential practical applications. It can be argued, however, that most research, in order to receive funding, must present some benefit to the general pool of scientific knowledge. It does not follow that every researcher working within a government-sponsored collaboration inherently serves the national interest to an extent that justifies a waiver of the job offer requirement. At best, the petition was filed prematurely, before the petitioner's influence in the field could be gauged.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not

established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.